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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,
PETITIONER

—VS—

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Alabama entered in the above case on August 23, 1972.

OPINIONS BELOW

The opinion of the Court of Civil Appeals of Alabama is reported at 268 So. 2d 829, and a copy of that opinion is attached hereto as Appendix A. The Supreme Court of Alabama denied certiorari to review that judgment on October 19, 1972, and denied a petition for rehearing on No-

vember 30, 1972, and that memorandum opinion is reported at 268 So. 2d 834, and a copy is attached hereto as Appendix B.

JURISDICTION

The Supreme Court of Alabama denied a rehearing to review the judgment and opinion of the Court of Civil Appeals of Alabama on November 30, 1972. On the 1st day of March, 1973, this court through Justice Powell, granted an extension of time within which to file a Petition for Writ of Certiorari, up to and including March 28, 1973. The jurisdiction of this court is invoked under 28 USC 1257(3).

THE QUESTION PRESENTED

Does Title 30, Section 7(1), of the Code of Alabama, which requires employers to pay an employee during his absence from work while summoned as a juror, his usual compensation for such employment less the compensation the employee receives as a juror, violate the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISION

The constitutional provision involved is in Section One of the Fourteenth Amendment to the United States Constitution, which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

The statute involved is contained in Title 30, Section 7(1), Code of Alabama 1940, which reads as follows:

> EMPLOYEE SERVING AS JUROR ENTITLED TO USUAL COMPENSATION LESS JUROR'S FEE. — Upon receiving a summons to report for jury duty, any employee shall on the next day he is engaged in his employment exhibit the summons to his immediate superior and the employee shall thereupon be excused from his employment for the day or days required of him in serving as a juror in any court created by the constitutions of the United States or the State of Alabama or the laws of the United States or the State of Alabama. Notwithstanding the excused absence as herein provided, any full-time employee shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as such juror. It shall be the duty of all persons paying jurors their fee or compensation for services to issue to each juror a statement showing the daily fee or compensation and the total fee or compensation received by the juror."

STATEMENT

This case arose as a result of an action by the petitioner, an employee, against the respondent, his employer, to recover compensation lost by the employee as a result of being required to serve as a juror. The action was brought pursuant to Title 30, Section 7(1), Code of Alabama, which

requires all Alabama employers to pay their employees their usual compensation for time off when the employee is absent from work due to serving on a jury, less the compensation the employee receives as a juror. The constitutionality of the statute was first raised in the trial court by a pleading that it was in violation of the United States Constitution and denied the respondent due process of law. The pleading, a demurrer, was overruled and the respondent excepted. This appears at pages 3 and 4 of the record below. On appeal to the Court of Civil Appeals of Alabama, the constitutional question was again raised by an assignment of error, which the court below considered well taken. The assignment is number one, and is on page 18 of the record below. The case was submitted to the trial court on an agreed statement of facts. No oral testimony was taken. The statement of facts was as follows:

"(1) That the plaintiff was employed by the defendant during the week of November 3, 1969.

"(2) That during the week of November 3, 1969, the plaintiff was subpoenaed for jury duty for said week, and, in fact, did serve on, to-wit: November 3, 4, and 5, 1969.

"(3) That the plaintiff was paid for said jury duty by the Circuit Clerk of Etowah County, Alabama.

"(4) That the plaintiff made demand upon the defendant for payment to him of $63.00, which said sum represented the difference in his jury pay and his regular wages, pursuant to Act Number 619 of the Legislature of Alabama 1969.

"(5) That the defendant refused to pay the plaintiff and has continually refused to pay the plaintiff since said date."

The trial court rendered a verdict for the petitioner for the amount sued for. The case was appealed to the Court of Civil Appeals of Alabama, an intermediate appellate court, which reversed the trial court on August 23, 1972, holding the Alabama statute unconstitutional. The court held that it constituted a taking of private property without compensation, which would not be justified under the state's police power or its power to tax. The court stated that, in the absence of special benefits to employers, the state had no basis for enacting the legislation. A petition for rehearing was timely filed and denied on September 20, 1972. Review of this judgment was sought from the Supreme Court of Alabama, but a petition for a writ of certiorari was denied on October 19, 1972. A petition for rehearing was timely filed and denied on November 30, 1972. The Supreme Court of Alabama made no determination of the merits of the statute in declining to review the opinion of the Court of Civil Appeals.

The petitioner sought an extension of time within which to file this petition for writ of certiorari and this Court extended the time for filing to March 28, 1973.

REASONS FOR GRANTING THE WRIT

The decision below demands review by this Court because it involves a substantial constitutional question in the interpretation of the Fourteenth Amendment to the United States Constitution. It is in conflict with previous decision of this Court in *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 72 S.Ct. 405, and followed the case of *Coppage v. Kansas*, 236 U.S. 1, 34 S.Ct. 240, a case long since discarded by this Court.

The decision below is a flagrant disregard of the principles and propositions of this Court. The result of the decision of the Alabama Court is to resurrect the infamous legal principles followed at the turn of this century to hold invalid useful and constructive social legislation. To adopt the ruling of the court below would void the basis upon which rests programs such as Social Security, Workmens' Compensation and Unemployment Insurance. It represents a position so long forsaken as to defy explanation of its adoption in the Twentieth Century. Its logic is reminiscent of many cases involving social legislation of the late Nineteenth Century. It cannot, under any interpretation be justified under modern principles established by this Court that courts do not sit as "super-legislatures" to review actions of elected legislative bodies.

In its decision, the Alabama court relied upon the case of *Coppage v. Kansas*, 236 U.S. 1, 34 S.Ct. 240, for the proposition that a statute, unless it has an express or implied objective in promoting the welfare of the general public, *other* than leveling inequalities of fortune, is an unconstitutional interference with rights guaranteed under the Fourteenth Amendment. In other words, its expressed or implied purpose must be to advance public welfare beyond the mere leveling of inequalities of fortune or it is unconstitutional. The court further determined that the only apparent intent of the statute was that an employee not suffer economic loss while serving as a juror, which would merely be leveling inequalities of fortune between employers and employees by compelling the former to compensate employee-jurors, rather than placing the burden on the general public. Thus, since the implied purpose was to level inequalities of fortune, the statute was an unconstitutional interference with the rights of employers guaranteed under the Fourteenth Amendment,

and thus invalid under the reasoning of the *Coppage* case. This appears to be the legal logic applied by the court. The rationale of the *Coppage* case, is not followed today. As was stated by Mr. Justice Black in *Ferguson v. Skrupa*, 83 S.Ct. 1028 (1963), at page 1031:

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — *has long since been discarded.*"[1] (Emphasis added.)

The *Coppage* case, relied upon heavily by the court below, does not represent the modern viewpoint. The courts of this country, led by the decisions of this court, have returned to the original proposition that courts do not substitute their social and economic opinions for those of the legislatures, and do not sit as "super-legislatures" to weigh the wisdom of legislation. *Day-Brite Lighting, Inc. v. Missouri*, supra. This trend was expressed by Mr. Justice Stewart in *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970), at page 1161, as follows:

> "For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S.

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[1] **Lochner v. New York**, 198 U.S. 45, 25 S.Ct. 539.
Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240.
Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394.
Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412.

483, 488, 75 S.Ct. 461, 464, 99 L.Ed. 563. That era long ago passed into history. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed. 2d 93."

The *Dandridge* case involved a regulation of the Maryland Department of Public Welfare placing a maximum limit of monthly benefits payable under AFDC (Federal Aid to Families with Dependent Children), regardless of size of the family and its actual need as computed under the program's standards. The need of each family was computed by reference to the size of the family and its particular circumstances. The need of small families, when computed, would be within the maximum limits, but the need of large families, when computed, would substantially exceed the maximum amount payable. The regulation was upheld against the argument that it discriminated against large families in violation of the Equal Protection Clause of the Fourteenth Amendment. The court held that a state regulation, in economic or social matters, is not unconstitutional because it results in some inequality, as long as the state has a legitimate interest in the matter at hand. The State of Maryland had such an interest in encouraging employment and preventing discrimination between welfare families and families of the working poor, thus the regulation was valid in maintaining such an equitable balance, although it was not mathematically perfect. The test was whether the action of the state had a rational basis and was free from invidious discrimination. The Equal Protection Clause was said not to require a state to choose between attacking every aspect of a problem or not attacking the problem at all.

When that test is applied to the matter at hand, the Alabama statute is clearly constitutional. The state has a legitimate interest in insuring that trials be conducted before

juries which represent a true cross-section of the community. That one is entitled to be tried before a jury of his peers, or have his dispute tried before a jury of his peers, is fundamental to American jurisprudence. If the decision of the court below is upheld, simple economics will dictate avoidance of jury service and the resulting financial loss. Those who are not benefitted by the statute now, because of no employer-employee relationship, seek to avoid jury service for the same reason. If those who are so employed are denied the benefits of the statute, juries representative of the community will be a thing of the past in Alabama. For want of benefits to the former, the latter must suffer. If the problem cannot be totally corrected, then you cannot partially correct it. That is the position of the respondent. The State of Alabama has been put in the position of attacking the problem in all aspehts or not attacking it at all. That, this Court has said in *Dandridge*, supra, is not required under the Equal Protection Clause.

Alabama has another justifiable interest in seeing that economic hardship is not cast upon prospective jurors who are compelled, by law, to leave work and serve as jurors. Just as Maryland was held to have a legitimate interest in avoiding discrimination between welfare families and families of the working poor, Alabama, by the same token, has the same interest in avoiding discrimination between those called for jury service and those who are not called. The statute provides for an equitable balance between the two, and should not be rendered invalid because it places a burden upon the employer.

It should be noted at this point that the statute applied to *all* employers, without classification. That a business regulation may reduce the net income of the business is not

a constitutional infirmity. *Day-Brite Lighting v. Missouri*, supra.

The decision of the Alabama court is clearly out of harmony with the decisions of this court. Because of this conflict, and because it interprets a vital constitutional provision, it is most urgent that this court review the decision below.

There is yet another compelling reason for granting review, and that involves the apparently hopeless conflict of the lower court's decision with this court's decision in *Day-Brite Lighting v. Missouri*, supra. That case was decided in 1952, and concerned the constitutionality of a Missouri statute which made it a misdemeanor for any employer to deduct wages from an employee who absented himself from work to vote. The employee was entitled to four hours absence from work between opening and closing of polls, during which time the employer could not deduct wages, although the employer naturally received no service during that time. This court held that it was not rendered unconstitutional because the employer had to pay wages during the period of time he received no service since the fixing of the financial burden for employees voting was within the police power of the legislature to promote public welfare.

The decision below should have been decided in accordance with this case. The holding was entirely inconsistent with it. The *Day-Brite* case cannot be substantially distinguished from the case at hand. The lower court sought to distinguish it on the basis of the evils which each respective legislature sought to correct. The purpose of the Missouri statute was to prevent employer influence over voting, while the purpose of the Alabama statute was to prevent economic

hardship on jurors. We submit there is no valid distinction. If the State of Maryland has a legitimate interest in preventing economic discrimination between welfare families and families of the working poor, then the State of Alabama has a legitimate interest in preventing economic discrimination between jurors and non-jurors, and thus is in a position to so regulate and pass legislation to that end. Furthermore, as Missouri was held to have a legitimate interest in "getting out the vote," so must Alabama be held to have a legitimate interest in insuring representative juries in its courts.

In summary, to hold that employers do not have to compensate for time lost as a juror, in light of this court's holding that they must compensate for time lost while voting, presents two irreconcilable positions requiring determination or clarification by this court. The Alabama decision is out of step with the modern trend of reviewing legislative acts which this Court has established. To quote from *Day-Brite*, supra, at page 423:

> "But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."

And, further, in holding that business, economic and social issues were best left to legislative decision, at page 424:

> "The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well being of the community is one part of it; the political well-

being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. *But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the Lochner, Coppage, and Adkins cases.*

"The classification of voters so as to free employees from the domination of employers is an attempt to deal with an evil to which the one group has been exposed. The need for that classification is a matter for legislative judgment, American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 69 S.Ct. 258, *and does not amount to a denial of equal protection under the laws."* (Emphasis added)

We submit that the court below has decided a very substantial and important constitutional issue which either 1) has not been specifically determined by this court, or 2) has been determined contrary to this court's holdings in the cases of *Day-Brite Lighting v. Missouri, Ferguson v. Skrupa,* and *Dandridge v. Williams,* supra. The decision is either in conflict with these cases, or is not in conflict and thus a matter not decided by this court. Furthermore, the court below relied upon *Coppage v. Kansas,* supra, a decision no longer recognized by this court.

The opinion of the court below has raised issues which, we respectfully submit, should be settled by this Court. The issues involved here, and the effect of the decision below, if

unreversed, upon the authority of an elected legislative body to pass laws to promote the social and economic welfare of its citizens as it sees fit, makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas E. Davis, an attorney of the law firm of Burns, Carr & Shumaker, attorneys of record for Sam Dean, petitioner herein, depose and say that on the 26 day of March, 1973, I served a copy of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama on respondent herein, by delivering the same to Honorable George Ford, of the law firm of Dortch, Wright & Ford, 307 Broad Street, Gadsden, Alabama, attorneys of record for the respondent herein.

Thomas E. Davis

Subscribed and sworn to before me, this —— day of March, 1973.

NOTARY PUBLIC, STATE OF ALABAMA AT LARGE

APPENDIX A

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

SPECIAL TERM, 1972

7 Div. 50

The Gadsden Times Publishing Corporation,
a corporation

v.

Sam Dean

Appeal from Etowah Circuit Court

PER CURIAM

This is an appeal from the Circuit Court of Etowah County on a two-count complaint filed by appellee. One count of the complaint is on an account in code form. Count two was brought under Tit. 30, § 7(1), Code of Alabama 1940. The matter was submitted to the trial court without a jury on an agreed statement of facts and thereafter judgment was entered for appellee (plaintiff below) in the amount of $63.90 plus costs.

The stipulated facts reveal the following: Appellee was employed by appellant during the week of November 3, 1969; that during the week of November 3, 1969, the appellee was subpoenaed for jury duty and, in fact, did serve on the jury on November 3, 4, and 5, 1969; that appellee was paid for said jury duty by the circuit clerk of Etowah County, Ala-

bama; that appellee made demand upon appellant for the payment to him of $63.90, which sum represented the difference in his jury pay and his usual compensation, pursuant to Tit. 30, § 7(1), Code of Alabama 1940; that defendant refused to pay and has continuously refused to pay the plaintiff the said sum.

Tit. 30, § 7(1), Code of Alabama 1940, reads as follows:

> "Upon receiving a summons to report for jury duty, any employee shall on the next day he is engaged in his employment exhibit the summons to his immediate superior and the employee shall thereupon be excused from his employment for the day or days required of him in serving as a juror in any court created by the constitutions of the United States or the state of Alabama or the laws of the United States or the state of Alabama. Notwithstanding the excused absence as herein provided, any full-time employee shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving as such juror. It shall be the duty of all persons paying jurors their fee or compensation for services to issue to each juror a statement showing the daily fee or compensation and the total fee or compensation received by the juror."

Appellant argues some five assignments of error which can be categorized as follows: Assignment of Error No. (1) contends that the judgment of the trial court is erroneous in that Tit. 30, § 7(1), Code of Alabama 1940, is in violation of § 1 of the fourteenth amendment to the Constitution of the United States. Assignment of Error No. (3) contends that the judgment of the trial court is erroneous in that the same code section violates art. I, § 23, of the Constitution of Ala-

bama of 1901. Assignments of Error Nos. (4) and (8) are to the effect that the complaint fails to state a cause of action under Tit. 30, § 7(1), Code of Alabama 1940. The last assignment of error argued attacks the sufficiency of the evidence to support a judgment on either count of the complaint.

Appellant, in his brief, persuasively contends that the Constitution of the United States is violated in that Tit. 30, § 7(1), Code of Alabama 1940, takes property from the appellant without due process of law, and denies appellant equal protection of the law. To this contention, appellee ites authority that the legislative act in question is a valid exercise of the state of Alabama's police power to protect the general welfare of the public.

This dispositive question presented by this appeal as we view it is whether or not an employer's constitutional rights are violated when he, the employer, is required to pay his employee, during his absence from work while performing jury duty, his usual compensation for such employment less the fee or compensation the employee receives for serving as a juror, where such employer, naturally, during the absence, receives no services from the employee.

Every presumption is in favor of the constitutionality of an act of the legislature. The Supreme Court of Alabama has said:

> "[T]his court will not declare it invalid unless, in its judgment, the act clearly and unmistakably comes within the inhibition of the constitution. . . ." *Mobile Housing Bd. v. Cross*, 285 Ala. 94, 97, 229 So. 2d 485, 487.

The Supreme Court further stated, in *Brittain v. Weatherly*, 281 Ala. 683, 685, 207 So. 2d 667, 668:

> "It is the duty of courts to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that it is in violation of the fundamental law. . . ."

In passing upon the constitutionality of a legislative act the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than to strike down the enactment of a coordinate branch of the government. *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So. 2d 810.

Courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the courts' notion of natural, social, or political rights of the citizen, or even if the courts think the act harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies and are matters with which the courts have no concern. The only question for the court to decide is one of power, not of expediency or wisdom. *Alabama State Federation of Labor v. McAdory, supra; City of Ensley v. Simpson*, 166 Ala. 366, 52 So. 61; *State v. Alabama Fuel & Iron Co.*, 188 Ala. 487, 66 So. 169.

The above stated principles are, of course, strongly adhered to by this court; however, where the protection of the Federal Constitution is sought to overthrow legislation the courts must determine whether such legislation is a fair, reasonable and appropriate exercise of the state's power. *Lash v. State*, 244 Ala. 48, 14 So. 2d 229.

The Supreme Court of the United States has said that police power has no exact definition. *Berman v. Parker*, 348

U.S. 26, 99 L. Ed. 27, 75 S.Ct. 98. The Supreme Court of Alabama, in *Wolf v. Smith*, 149 Ala. 457, 463, 42 So. 824, 826, said:

> "We shall not attempt a definition of the police power, that may be learned, if desired, in the text-writers and from the adjudged cases, albeit it has been said that a definition has rarely been attempted by the courts, and the attempt has never been attended with complete success. . . ."

It can be said that the police power of the state may be employed to protect the health, safety, morals, and general welfare of the community. In *Allinder v. City of Homewood*, 254 Ala. 525, 531, 49 So. 2d 108, 112, Mr. Justice Foster said:

> "Such power is not limited to protection of public health, but extends to matters of public convenience and matters pertaining to public wellbeing or welfare. . . ."

Neither appellant nor appellee, in their excellent briefs, point out to the court any state which has enacted a statute similar to the one in question. The court's research reveals only one such similar statute, which was enacted by the legislature of the state of Hawaii and is cited as H. R. S., § 388-32. The Hawaii act requires that every employer who employs more than twenty-five persons shall pay to each of his employees who serves on the jury or public board compensation in an amount equal to the difference between the remuneration which the employee receives for such service on a jury or public board and any other remuneration he would have received from his employer had he not served on the jury or public board.

The constitutionality of that statute was tested in *Hasegawa v. Maui Pineapple Company*, 475 P. 2d 679. The Supreme Court of Hawaii held that this act of the legislature was not a valid exercise of the state's police power but was a class distinction in violation of the equal protection clauses of both the Hawaii and Federal Constitutions. The Hawaii Supreme Court, in the *Hasegawa* case, *supra*, cites and attempts to distinguish the case of *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 96 L. Ed. 469, 72 S.Ct. 405 (1952).

Appellee, in his brief, cites to us *Day-Brite, supra*. The Hawaii Supreme Court determined that the rationale of the Supreme Court of the United States in *Day-Brite Lighting*, in holding that a Missouri legislative act which made it a misdemeanor for any employer to deduct wages from an employee who absented himself from his place of employment to vote was a valid exercise of the police power of the state of Missouri, was based upon the fact that the evil attempted to be corrected was that employers might use their power over employees' wages to coerce them in voting. *The Supreme Court of Hawaii, in Hasegawa, supra, determined the purpose of their statute, H. R. S., § 388-32, was not to prevent employer coercion of employees in the exercise of their franchise, but rather was to insure that those rendering services to the state receive adequate compensation. This, we also determined, is the purpose of the Alabama statute. The issue is the reasonableness of a legislative decision as to who should be called upon to pay this compensation.*

The fourteenth amendment to the Constitution of the United States does not interfere with a proper exercise of the police power of a state, but the power must be so exercised as not to invade unreasonably the right guaranteed by the Federal Constitution.

The fourteenth amendment provides no state shall deprive a person of his life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the law.

The Supreme Court of the United States, in *Coppage v. Kansas*, 236 U. S. 1, 59 L. Ed. 441, 34 S. Ct. 240, said that if in a statute there is no object or purpose, express or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his financial independence, an unconstitutional interference with the normal exercise of personal liberty and property rights is the primary object of the statute. It is not an incident to the advancement of the general welfare and is barred by the fourteenth amendment.

Here, the only apparent intent of the legislative act is that an employee shall not suffer economic loss while serving as a juror. Jurors are, while it may be a meager sum, paid by the state. Tit. 11, §§ 14 and 98, Code of Alabama 1940. These code sections clearly show that the state legislature, by enacting the above and various local acts, have determined what the amount of jury pay should be and where it is to be derived, to wit, the county treasury. *The statute at bar would require employers to, in effect, supplement this pay while requiring others to make no contribution.*

Service as a juror is, in effect, part-time public employment; however, in increasing jury pay the legislature did not assess the general public by apportioned taxation. *Instead, the legislature made a class distinction and placed the cost of increased jury pay for some of our citizens solely*

on private employers. There is no specific benefit to employers that would justify this class distinction. *Absent such a benefit there is no basis for singling out this one group from the general populace in seeking to achieve the legislative purpose. Hasegawa v. Maui Pineapple Co., supra.*

The Supreme Court of Alabama has said that the legislature is not prohibited from making reasonable classification in the operation of our laws; but such a classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any such substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Birmingham-Tuscaloosa Ry & Utilities Co. v. Carpenter,* 194 Ala. 141, 69 So. 626.

In exercising the right to classify in order to achieve social goals, the legislature may not act arbitrarily; that is, *the classification of a particular group as a subject for the regulation must be reasonable in relation to the purpose of the legislature.* The United States Supreme Court, in *Allied Stores of Ohio v. Bowers,* 358 U. S. 522, 3 L. Ed. 2d 480, 79 S. Ct. 437, stated:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that *the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .'* " (358 U. S. at 527, 79 S. Ct. at 441)

Tit. 30, § 7(1), Code of Alabama 1940, attempts to shift to private employers some of the expense of running the public function of the courts, and this court cannot escape the conclusion that such action is a taking of private property which would require just compensation. The "taking", as we view it, cannot be justified under the state power to tax, because the act is not a general tax measure, and the group who bears the burden, the employer, receives no special benefit.

The goal of our legislature, in seeking to insure that certain citizens do not suffer economic loss while performing jury duty, is a laudible goal, but in this instance it is attempted to be accomplished by unconstitutional means.

It should be noted that the act in question applies to all employers; the corporate employer, the small businessman, the corner service station, the housewife who is fortunate enough to employ full-time domestic help, and to require these persons to supplement jury pay while exempting others from bearing their proportionate share of this essential function is, to this court, unconstitutional.

There is no question but that it is the right of every union, negotiating with an employer, to bargain for no loss of pay while its members are serving as jurors. It is also the right of an individual employee to make the matter in question a condition of his employment, but we do not believe the constitution allows the state to require the same of an employer.

This court is mindful that neither the legislature nor the learned trial judge had any court decision in this state or any state, or any state statute, other than that which we

have noted, from which to draw experience or guidance.

We must therefore hold that Tit. 30, § 7(1), Code of Alabama 1940, not being justified under either the police power or power to tax, is in violation of the fourteenth amendment to the United States Constitution.

Appellant timely filed a reply brief to appellee's brief. Thereafter, appellee timely filed a motion to strike appellant's reply brief, assigning eight grounds. This court is of the opinion that some of appellee's grounds are well taken and for this reason the appellant's reply brief was not considered by this court.

Having concluded that Tit. 30, § 7(1), Code of Alabama 1940, is violative of the United States Constitution, other assignments argued by appellant need not be considered. The case, therefore is reversed.

REVERSED.

All judges concurring.

APPENDIX B

IN RE THE GADSDEN TIMES PUBLISHING CORP., a corp.

v.

SAM DEAN

EX PARTE SAM DEAN

SC 132.

Supreme Court of Alabama.

Oct. 19, 1972.

Rehearing Denied Nov. 30, 1972.

Certiorari to the Court of Civil Appeals.

Thomas E. Davis, Burns, Carr & Shumaker, Gadsden, for petitioner.

No brief for respondent.

COLEMAN, Justice.

Petition of Sam Dean for Certiorari to the Court of Civil Appeals to review and revise the judgment and decision of that Court in Gadsden Times Publishing Corp v. Dean, 19 Ala.App. 45, 268 So.2d 829.

Writ denied.

HEFLIN, C. J., and HARWOOD, BLOODWORTH and McCALL, JJ., concur.

72-1310

MAR 28 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,

Petitioner

v.

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,

Respondent

BRIEF OF THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. BAXLEY
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IN THE

Supreme Court of the United States

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NO._____

SAM DEAN,

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v.

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Respondent

BRIEF OF THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE STATE OF ALABAMA

The action of the Alabama judiciary in declaring unconstitutional Title 30, Section 7(1), Code of Alabama 1940, profoundly effects the operation of the jury system in the State of Alabama. The striking of this statute will greatly decrease the caliber and quality of Alabama juries and is to the general determinent of the State. Therefore, the State of Alabama, by and through the Attorney General, files this brief in support of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Title 30, Section 7(1), Code of Alabama 1940, requires all Alabama employers to pay any employee called to serve as a juror his full salary, less the fee paid jurors by the State. The constitutionality of the statute was raised as a result of an action by the Petitioner, an employee, against his employer to recover that part of his salary lost while serving as a juror. The trial court rendered a verdict for the Petitioner for the amount sued for. The case was appealed to the Alabama Court of Civil Appeals which reversed and on August 23, 1972 entered a judgment striking the statute as violative of the Fourteenth Amendment of the United States Constitution. Petition for Rehearing was denied on September 20, 1972. The Supreme Court of Alabama denied certiorari on October 19, 1972 and a timely petition for rehearing of the petition was denied on November 30, 1972.

REASONS FOR GRANTING THE WRIT

This decision is clearly contrary to a prior ruling by the United States Supreme Court in the case of *Day-Brite Lighting Company v. Missouri*, 342 U.S. 421, 96 L.Ed. 469, 72 S.Ct. 405 (1952). In *Day-Brite*, a Missouri statute requiring employers to pay all employees full salary during a four hour period in which employees were entitled to absent themselves from work for the purpose of voting, was challenged on grounds that it violated the constitutional guarantees of due process and equal protection. The issue in the *Day-Brite* case was almost identical with the one presented by the instant case: Whether a state, through duly enacted legislation, may compel employers to compensate employees for time taken from work to perform a civic duty even though the employees rendered no service to the employer during this

time.[1] The United States Supreme Court, through Justice Douglas, held that the statute was not rendered unconstitutional by the fact that the employer was required to compensate the employee for a period of time during which the employee performs no service, and that such compulsion was justified under the State's inherent police power to pass regulations for the good of the general public. Since this Court has held constitutional a state statute requiring an employer to pay an employee for time off for voting, it would seem incumbent on this Court to hold constitutional a statute compelling payment for time lost while serving on a jury. Certainly the interest of the state in having the populace vote cannot be greater or more pressing than the interest of the state in having the populace serve as jurors. In fact, to the extent that there is a distinction, it lies in the fact that while voting is the responsibility of every citizen the state does not compel its citizens to vote; but the state does compel jury duty, thus making the need for state compelled compensation more emphatic in the instant case than in the *Day-Brite* decision.

It is argued, however, that *Day-Brite* may be distinguished from the instant case in that the statute under consideration in *Day-Brite* was enacted to insure that employers

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[1] The Court of Civil Appeals has succinctly stated the issue in the instant case:

> "This dispositive question presented by this appeal as we view it is whether or not an employer's constitutional rights are violated when he, the employer, is required to pay his employee, during this absence from work while performing jury duty, his usual compensation for such employment less the fee or compensation the employee receives for serving as a juror, where such employer, naturally, during the absence, receives no services from the employee."

Compare the above with the following statement from **Day-Brite.**

> "The only semblance of substance in the constitutional objection to Missouri's law is that the employer must pay wages for a period in which the employee performs no services."

did not "use their power over employees' wages to coerce them in voting." While the object of the Alabama statute was merely "to insure that those rendering services to the state receive adequate compensation."[9] Surely the fallacious reasoning of this argument is obvious. There is no reason why an employer could not use his position to influence an employee called as a juror just as much as he could influence an employee on election day. The potential for coercion of employees by employers is no less great in this instance than in the *Day-Brite case*. Furthermore, there can be no question that at least a secondary objective of the Missouri statute was to adequately compensate those rendering services to the state, to insure, so far as possible, that citizens do not suffer economic loss because they perform their civic duty. As Justice Jackson pointed out in his dissent in *Day-Brite*, the statute fails to compensate those who are self-employed, but surely it is evident that there is a far greater certainty of loss on the part of a juror or voter who is on salary than on the part of those who own their own business or are otherwise self-employed.

The Alabama judiciary has refused to follow *Day-Brite*, a United States Supreme Court decision directly in point, and relies instead on a decision by the Supreme Court of Hawaii, *Hasegawa v. Maui Pineapple Company*, 475 P.2d 679, and the case of *Coppage v. Kansas*, 236 U.S. 1, which was treated in *Day-Brite* as having been overruled.

The *Hasegawa* case involved a statute which required an employer to pay an employee full salary for any time spent on serving on a jury, or on a public board. The facts of the

---

[9] 288 So.2d at 832. It is not clear if the Alabama Court of Appeals is drawing this distinction or merely referring to a distinction drawn by the Supreme Court of Hawaii.

case were that an employee of Appellant sought compensation for his service on a liquor commission. The Supreme Court of Hawaii held the statute compelling compensation unconstitutional on grounds that it violated due process and equal protection.

It is highly likely that the *Hasegawa* opinion is contrary to *Day-Brite*, but even if it be considered not to be in conflict, it would still not be even persuasive authority in the instant case since it is readily distinguishable on its facts and on the basis of the policy considerations involved. Alabama's statute has no provision requiring compensation for service on a public board, but is limited solely to payment of jurors. There may well be some question as to the constitutionality of compelled compensation for public board members since service on such boards is voluntary and one could volunteer for services on so many boards that he performed no service for his employer, but could still receive his regular wage. Jury duty is, on the other hand, compulsory unless excused by the court and very infrequent. Furthermore, there can be no question but that the interest of the state in compensating public board members and jurors is not the same since, service on a public board being voluntary, the hardship of imposing wage loss to a member of a public board cannot be equated with that imposed on a juror.

In reaching this decision the Alabama Court of Civil Appeals also relied on the case of *Coppage v. Kansas*, supra. While it cannot be said that *Day-Brite* specifically overruled *Coppage*, the majority clearly questioned its philosophical soundness and treated the judicial position represented by that decision as one the judiciary had advanced beyond. At one point Justice Douglas said the following: "We could strike down this law (the Missouri statute) only if we re-

turned to the philosophy of the Lochner, Coppage and Adkins cases."

It is also interesting to note that in many respects the opinion by the Alabama Court of Civil Appeals sounds disturbingly like a paraphrase of Justice Jackson's dissent in *Day-Brite*. The Court of Appeals relies upon the following argument in striking down the Alabama statute:

> "It should be noted that the act in question applies to all employers; the corporate employer, the small businessman, the corner service station, the housewife who is fortunate enough to employ full-time domestic help, and to require these persons to supplement jury pay while exempting others from bearing their proportionate share of this essential function is, to this court, unconstitutional.
>
> "There is no question but that it is the right of every union, negotiating with an employer, to bargain for no loss of pay while its members are serving as jurors. It is also the right of an individual employee to make the matter in question a condition of his employment, but we do not believe the constitution allows the state to require the same of an employer."

Compare the above with the argument advanced by Justice Jackson in his dissent:

> "The Court, by speaking of the statute as though it applies only to industry, sinister and big, further obscures the real principle involved. The statute plainly requires farmers, small service enterprises, professional offices, housewives with domestic help, and all other employers, not only to allow their employees time to vote, but to pay them for time to do so.
>
> * * *

"It undoubtedly is the right of every union negotiating with an employer to bargain for voting time without loss of pay. It is equally the right of any individual employee to make that part of his hire.

* * *

"But a constitutional philosophy which sanctions intervention by the State to fix terms of pay without work may be available tomorrow to give constitutional sanction to state-imposed terms of employment less benevolent."

In conclusion, it should be brought to the Court's attention that the burden imposed on the employer by this statute is minimal compared to the benefit to the general public and the State of Alabama.

Jury service in the State of Alabama is an infrequent duty. The time which an employee would be absent would only be the length of the court term or the length of the trial. Court terms in Alabama are generally for one week, and most trials last only one or two days. Thus, the burden would be both infrequent and modest, while the benefits to the State and its judicial system are extensive and far reaching. This legislation will unquestionably result in an overall increase in the caliber of Alabama juries. Our more highly paid and highly educated citizens will not try to avoid jury duty because of the financial sacrifice which would otherwise be imposed. On the other hand the statute encourages a better representation of Black people and subsistence income level citizens since they could then serve without total disruption of their financial situation.

The extensive benefits of the statute are obvious and

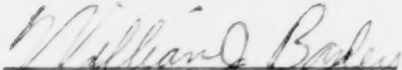
should be more than sufficient to outweigh the minimal burden on employers.

CONCLUSION

The question presented by this case is quite simply whether an employer's constitutional rights are violated by a statute which requires the employer to compensate an employee who is absent while performing a public service; the employer, of course, receiving no services from the employee during his absence. The *Day-Brite* decision clearly holds that such a statute is not constitutionally invalid. However, the Alabama courts have refused to follow this decision of the United States Supreme Court and has chosen to rely upon a decision by the Supreme Court of Hawaii and an older decision of this Court, the philosophy of which has long since been abandoned.

For the reasons set forth above and because this is an issue which will have such far reaching effects on the judicial system and the quality of justice in the State of Alabama, the State respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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PROOF OF SERVICE

I, L. G. Kendrick, Assistant Attorney General for the State of Alabama, depose and say that on the 26 day of March, 1973, I served a copy of the foregoing Brief of the State of Alabama as Amicus Curiae in Support of the Petition for a Writ of Certiorari on respondent herein, by placing said copy in the mail, postage prepaid, and properly addressed to Honorable George Ford, of the law firm of Dortch, Wright & Ford, 307 Broad Street, Gadsden, Alabama, attorneys of record for the respondent herein.

L. G. Kendrick

L. G. KENDRICK

Subscribed and sworn to before me, this 26 day of March, 1973.

Louise T. Norrell

NOTARY PUBLIC, STATE OF ALABAMA AT LARGE

FILED
MAY 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-1310

NO. A-904

SAM DEAN,

Petitioner

—VS—

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporaton,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

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Respondent prays this court shall enter an order dismissing the petition for a writ of certiorari in this cause, or in the alternative, shall enter an order denying the petition for a writ of certiorari to review the decision of the Court of Civil Appeals of Alabama.

OPINIONS BELOW

The petitioner correctly reports the decision of the Court of Civil Appeals of Alabama (*The Gadsden Times Publishing Corporation vs. Dean*, 268 So.2d 829), and also the denial, without opinion, of the petition for certiorari to the Supreme Court of Alabama (*The Gadsden Times Publishing Corporation vs. Dean*, 268 So.2d 834), but ac-

cording to the notification received by the attorneys for the respondent from the Clerk of the Supreme Court of Alabama, the application for rehearing directed to the Supreme Court of Alabama was denied on November 29, 1972, and not November 30, 1972, and a copy of the notification from the Clerk of the Supreme Court of Alabama to the attorneys for the respondent is attached hereto as appendix "A". This discrepancy is material to this Court's consideration of the merits of the motion to dismiss asserted by the respondent to the petition for writ of certiorari.

JURISDICTION DENIED

This court is without jurisdiction to entertain the petition for a writ of certiorari because the application therefor was not filed within the time allowed by the provisions of Title 28, Section 2101 (c), United States Code Annotated, nor was an order of this court extending the time within which to file a petition for writ of certiorari obtained within the time allowed by Title 28, Section 2101 (c), United States Code Annotated. The filing of a petition seeking an extension of time within which to file a petition for a writ of certiorari was not in compliance with the provisions of the United States Supreme Court Rule No. 34 (2), and the order of Justice Powell entered on March 1, 1973 granting the requested extension of time to petitioner was made more than ninety days from the denial of the application for a rehearing directed to the Supreme Court of Alabama.

THE QUESTIONS PRESENTED

(1) Did the petitioner make application for a writ of certiorari in this court within the time allowed by the provisions of Title 28, Section 2101 (c), United States Code Annotated, and in accordance with the provisions of the United States Supreme Court Rule No. 22 (4) and United States Supreme Court Rule No. 34 (2)?

(2) Is the decision of the Court of Civil Appeals of Alabama declaring the provisions of Title 30, Section 7 (1), Code of Alabama 1940 (Recompiled 1958) in accord with the applicable decisions of this court?

REASONS FOR DENYING THE WRIT OF CERTIORARI

The time within which the petition for a writ of certiorari must be presented to this court is within ninety days after the entry of such judgment or decree in the state appellate court having last asserted jurisdiction in the cause. Applying the provisions of United States Supreme Court Rule No. 34 (1) in computing the expiration of ninety days from the actual date of the denial of the motion for a rehearing by the Supreme Court of Alabama dictates that a petition should have been filed in this court on or before February 7, 1973. Any motion of petitioner under the provisions of United States Supreme Court Rule No. 34 (2) seeking an extension of time to file such a petition should have been filed on or before February 17, 1973. It is without dispute that the order of Justice Powell granting an extension of time within which to file the petition for a writ of certiorari in this court was not made and entered until after the expiration of ninety days, and contravenes the provisions of Title 28, Section 2101 (c), United States Code Annotated. Respondent takes issue with those averments of the motion seeking an extension of time wherein the filing of a petition for a writ of certiorari in this court was delayed because of the inaction of the Attorney General of Alabama in making known his wishes regarding the review of this matter in this court. The Attorney General of Alabama appeared amicus curiae in the Court of Civil Appeals of Alabama in support of the validity of the provisions of this Alabama statute, and was surely aware of the decisions rendered by the Court of Civil Appeals of Alabama and also the Supreme Court of Alabama.

The respondent respectfully submits that the petition for a writ of certiorari in this cause should now be dismissed because not filed in time.

An examination of the provisions of Title 30, Section 7 (1), Code of Alabama 1940 (Recompiled 1958), demonstrates that both from a legal and practical standpoint, there are many inequities which render it in violation of the provisions of the Fourteenth Amendment of the United States Constitution.

First, the statute requires that an "employee", upon exhibiting his summons to his superior, shall be excused from his "employment", but notwithstanding his absence, is entitled to his "usual compensation", less the amount received as jury pay. These terms are not defined and one is forced to speculate on who is an "employee" and what is "usual compensation" from "employment". In respondent's business operation, stenotype operators, pressmen, and other union members are paid "wages" as that term is usually applied, i.e. an hourly rate of pay. Other employees for respondent, such as news reporters, office personnel, janitors, secretaries, etc., are paid on a salary basis, per week or per month, while delivery of respondent's newspapers is done by "independent contractors" who purchase newspapers from the respondent and offer these newspapers for resale with a margin of profit for themselves. To which of these persons does the statute apply? Respondent suggests that even a broad definition of "employee" would cover only wage earners and salaried personnel within the protection of the statute, and therein lies a part of the discriminatory effect of the statute. For example, consider the situation in which a trial court of this state called one of the employees of respondent who is paid on an hourly basis, and another who earns his living as a life insurance agent, whose sole income depends upon the commissions received by him from the sale of policies by him. Since both respondent and the life insurance company depend upon the

work product of their respective workers, each has theoretically suffered the same loss, i.e., work product of one worker for the period of jury duty. But respondent's monetary loss does not end there, however, for in addition to the loss of a worker for the period of time during which he or she is serving as a juror, the respondent may be required to hire a temporary replacement or pay overtime to another worker and at the same time respondent will be required to pay the absent worker a portion of his or her wages though nothing is received by respondent in return. The life insurance company, on the other hand, only has an agent whose compensation is actually paid by those to whom he sells his policies so that all that the life insurance company has lost is its agent's time. Manpower loss has been the same to both the respondent and the insurance company, but the economic loss suffered by this respondent is far greater.

This respondent or any other employer claimed to be subject to the provisions of this statute do not exercise any control over the selection of those persons selected for jury duty and it is within the realm of possibility that more than one employee of the same business concern could be summonsed for jury duty during the same period of time. One can readily see the impact of this statute upon the business man who operates his shop, candy store, news stand, barber shop, etc., with only one or perhaps two employees as compared to those large business concerns having large numbers of employees. The employee performing jury duty loses nothing, even though he or she contributed nothing to his or her employer during that same period of time, and quite possibly could even cost his or her employer additional wages for replacement workers or for overtime compensation. Suppose the "boss" is called for jury duty. Who pays him? His business may lose, and certainly will not gain, from his fulfillment of his duty to serve the court system of his state or nation, yet

he cannot recapture that loss, for unfortunately he has no "employer" to call upon for monetary reimbursement. The same situation applies to the farmer, the professional man or woman, and the self-employed. Each may be called for jury duty with only the one occupying the privileged classification of "employee" receiving his regular compensation, while the other will only receive the statutory jury pay afforded by the existing state statutes. Like parties in like circumstances and conditions, have by virtue of the provisions of Title 30, Section 7 (1) received unequal treatment, and under no standards imaginable can this be said to constitute equal protection under the laws. Those fortunate enough to fall within the classification of the statute are rewarded for jury service, while the independent, self-employed citizen suffers, yet both persons did exactly the same service under the same or similar conditions. The real and obvious discrimination is readily apparent by considering the practical application of this statute, and is nothing more than an unwarranted attempt to shield one segment of the community from economic loss for serving as a juror while at the same time unduly burdening private industry. A classification permitted under the due process and equal protection guaranties of the federal constitution must of itself be reasonable and not arbitrary, and must be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and there must be uniformity within the class. *Praker City Cab Company vs. Pennsylvania*, 277 U. S. 389, 48 Supreme Court 553, 72 Lawyer's Edition 927.

Whatever evil was sought to be corrected by the enactment of Title 30, Section 7 (1) has at best been only partially satisfied, and this partial satisfaction has resulted in an unreasonable and arbitrary burden on those who come within the classification of an employer. On the other hand, the employee has suffered a windfall by which he may

receive a much more handsome fee for serving on a jury than does his self-employed neighbor. The Alabama Legislature has, in effect, placed an indirect tax upon employers to support the judicial system in this state. If this statute is held constitutional, what is to prevent the next legislature from completely abolishing any payment by the state to persons who serve as jurors thus throwing the entire expense of this vital governmental function upon private employers? A discriminatory and oppressive character of this statute is flagrant, and if jurors deserve more pay for their service, it is the duty of the State of Alabama, whom they serve, to provide the additional revenue through revenue raising measures applicable to all without discrimination.

The apparent intent of this statute is to relieve certain members of the public from some of the financial burdens which normally accompany jury service. This is a noble endeavor but to saddle another group of citizens with the cost of relieving this burden is unconscionable. Jury service is a public duty, and one's tenure as a juror is for a public use and a public purpose. To require of this respondent and other similarly situated employers to compensate these persons for jury service, without some benefit or compensation therefor, amounts to nothing less than the taking of private property for public use without just compensation. Whatever evil the enactment sought to correct, the cure is worse than the disease, for though many are favored, many are penalized. Private property, in the form of forced compensation with no return consideration or benefit, is being taken from employers to support, directly or indirectly, what has long been a public use and charge. This property of employers is not only taken without just compensation, but without any compensation whatsoever. Before the enactment of this statute, all jurors in Alabama serving the state court system were poorly paid, but now, thanks to this enactment, those jurors whom the legislature

chose not to favor are poorly paid. Taking of this property is by authority and with approval of the state, and though not denominated as a tax, a more appropriate label escapes the imagination.

In *Rinaldi vs. Yeager*, 384 U.S. 506, 86 Supreme Court 1497, 16 Lawyer's Edition 2d 577, this Court reiterated that the Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes, because it also imposes a requirement of some rationality in the nature of the class singled out, and a further requirement that there must be some relevance to the purpose for which the classification is made. This Court is not apprised by the petitioner in brief of the relevance of this statute as to the classification of employers in general. The Alabama Legislature now seeks to do by legislative fiat what has heretofore been the subject matter of negotiated contracts of employment between employers and labor unions. Petitioner asserts that the state of Alabama has a legitimate interest in insuring that trials be conducted before jurors which represent a true cross-section of the community, and secondly, in seeing that economic hardship is not cast upon prospective jurors who are compelled by law to leave work and serve as jurors. It is extremely doubtful whether or not this statute would remedy, either or both, of these noble aims. If one accepts the premise that a true cross-section of the community is only those people who work for wages, then this purpose is served. But the fallacy of this argument is demonstrated when one considers that a true cross-section of the community also includes self-employed persons, housewives, farmers, professional people, retired persons and other similarly situated persons who are not gainfully employed for wages by a private employer. To the assertion that the economic hardships of jury service should not be imposed on those who by serving on jury service forfeit all or a portion of their wages leaves one to wonder why the legislature does not simply increase

the rate of compensation paid to jurors for jury service rather than seeking to impose a tax on the business segment of the community. If the constitutionality of this statute is upheld, then what is to prevent the Alabama Legislature from next enacting a statute requiring that the salary of any public official who is elected shall be paid by his former employer because the state desires to attract a true cross-section of the community as public officers without economic hardships to the individual office holder.

Such legislation would apply to "all" employers which is a classification which the petitioner contends is a reasonable nondiscriminatory classification to support the validity of Title 30, Section 7 (1). Nor will the mere reduction in the income of an employer constitute a constitutional infirmity as claimed by petitioner in brief. One can readily see there is no end to the imposition of punitive legislation against employers if the provisions of Title 30, Section 7 (1) withstands the scrutiny of this Court in the light of the safeguards of the Fourteenth Amendment.

Respondent respectfully submits that the analogy which the petitioner draws between the "pay-while-voting" statutes and the "jury-pay" statute is erroneous. The purpose of the Missouri pay-while-voting statute was "designed to end the coercion of employees by employers in the exercise of the franchise" of voting. *Day-Brite Lighting vs. Missouri*, 342 U.S. 421, 72 Supreme Court 405, 96 Lawyer's Edition 469. The purpose of the Alabama statute as determined by the Court of Civil Appeals of Alabama was "to insure those rendering service to the state received adequate compensation", with the issue being who shall be called upon to pay this compensation. *The Gadsden Times Publishing Corporation vs. Dean*, 268 So.2d 829 (832). There can be little similarity between a voter who desires to take a few hours or perhaps a full day off from the duties of his employment to a juror who may be required to sit in attendance for a trial lasting days or weeks or months.

Perhaps the type legislation with which we are herein concerned is that of which Justice Jackson spoke in his dissent in the Day-Brite case when he mentioned state imposed terms of employment. The validity of a "pay-while-voting" statute was denied by the Court of Appeals of Kentucky in the case of *Illinois Central Railroad Company vs. Commonwealth*, 305 Kentucky 632, 204 Northwestern 2d 973. This Court declined to grant certiorari in that case. *Illinois Central Railroad Company vs. Commonwealth*, 334 U.S. 843, 68 Supreme Court 1511, 92 Lawyer's Edition 1767. A like result of unconstitutionality was reached by the Supreme Court of Illinois in the case of *Heimgaertner vs. Benjamin Electric Manufacturing Company*, 6 Illinois 2d 152, 128 Northeastern 2d 691 involving a pay-while-voting statute.

The only other jurisdiction which has had occasion to consider the constitutional validity of a jury-pay statute is the Supreme Court of Hawaii in the case of *Hasegawa vs. Maui Pineapple Company*, 475 Pacific 2d 679, which case is cited as persuasive authority by the Court of Civil Appeals of Alabama in its decision. The argument is advanced by amicus curiae that there is a distinction between the Hawaii statute and the Alabama statute because the Alabama statute only concerns pay to jurors while the Hawaii statute pertains both to jurors and public board members. No such distinction between the recipients of economic benefits was mentioned by the Hawaii Court, and the issue of constitutionality under both the Hawaii and Federal Constitution was resolved against the statute.

> "Increasing he civic responsibility of citizens and ensuring that those who serve their community do not suffer economic deprivation are undoubtedly goals which serve a high and benevolent purpose under our representative form of government. It is not the role of this court to debate the wisdom of those policies. However, it is the duty of this court to see that the legislature does not seek to achieve noble ends by un-

constitutionally arbitrary means. The statutory discrimination must be based upon differences that are reasonably related to the purpose of the law. Morey vs. Doud, 354 U.S. 457, 465, 77 Supreme Court 1344, 1 Lawyer's Edition 2d 1485 (1957). Specifically, in the case at hand, we must ask what is the 'ground of difference having a fair and substantial relation to the object' of this legislation which justifies the legislature in imposing on private employers this special burden of compensation? Allied Stores of Ohio vs. Bowers, supra 358 U.S. at 527, 79 Supreme Court 437.

. . . .

In the Day-Brite case the Missouri legislature had determined that employers as a class were using their power over their employees' wages to coerce them to vote as they directed. Day-Brite Lighting, Inc. vs. Missouri, supra at 421, 72 Supreme Court 405. In order to remedy this evil the statute prohibited employers from deducting wages while their employees absented themselves from work to vote. However, in the present case the purpose of HRS Section 388-32 is not to prevent employer coercion of employees in the exercise of their franchise, but rather to ensure that those rendering services to the State receive adequate compensation. At issue is the reasonableness of the legislative decision as to who shall be called upon to pay this compensation.

Those furnishing their services to juries and public boards and commissions are, in effect, part-time public employees; yet in seeking to increase their compensation, the state legislature did not assess the general public through apportioned taxation. Instead it chose to make a class distinction, imposing the economic cost of remuneration solely on private employers. The State has not demonstrated any special benefit to private employers that would justify this class distinction. Absent such a showing their is no rational basis for singling out this group from the general populace in seeking to achieve legislative purpose of HRS Section 388-32.

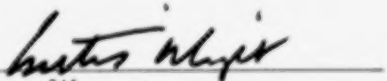
> The general public acting through its elected representatives has assumed the financial and administrative responsibility of having juries and public boards and commissions. These public functions, like the provision of police and fire protection, benefit all who live in the community. The cost of a proper state function conducted for the public benefit cannot be arbitrarily charged to one class in the society. (Authorities cited) There is nothing in the position of private employers within our society which places them in a relationship to these public institutions different from the relationship of the general public to them. Therefore, we hold that by imposing liability for the cost of juries and public boards and commissions on private employers HRS Section 388-32 works an invidious class distinction in violation of the equal protection clauses of both the Hawaii and Federal Constitutions.
>
> . . . .
>
> The right of the state to exercise its police power and right of taxation in the public interest is limited by the constitutional principle that private property shall not be taken for public use without just compensation. In effect, this principle affords the same protection against unreasonable and arbitrary government action that is found in the equal protection clauses. Thus, although the police power permits the state to regulate the use of an individual's property in order to protect the public health, safety and welfare, such regulation has its limits. If it goes too far it will be recognized as a 'taking' requiring the individual affected to receive just compensation. Pennsylvania Coal Company vs. Mahon, 260 U.S. 393, 415, 43 Supreme Court 158, 67 Lawyer's Edition 322 (1922)."

Likewise the Court of Civil Appeals of Alabama held that the Alabama Legislature had gone beyond the limits allowed by the Fourteenth Amendment to the United States Constitution and a similar result should be reached by this Court by a denial of further review.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that an order should be entered dismissing the petition for a writ of certiorari because the petition was not timely filed, and if this contention be without merit, then respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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PROOF OF SERVICE

I, Curtis Wright, of the law firm of Dortch, Wright & Ford, attorneys of record for The Gadsden Times Publishing Corporation, a corporation, respondent herein, depose and say that on the 11 day of May, 1973 I served copies of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the Court of Civil Appeals of Alabama on each of the several attorneys of record hereto as follows:

1. The Honorable Thomas E. Davis of the law firm of Burns, Carr, and Shumaker, Attorneys of Record for Sam Dean, petitioner herein, by placing three copies of said brief in the mail, postage prepaid and properly addressed to the Honorable Thomas E. Davis of the law firm of Burns, Carr and Shumaker, 821 Chestnut Street, Gadsden, Alabama, 35901.

2. The Honorable L. G. Kendrick, Assistant Attorney General for the State of Alabama, Attorney for amicus curiae, State of Alabama, by placing three copies of said brief in the mail, postage prepaid, and properly addressed to the Honorable L. G. Kendrick, Assistant Attorney General, Office of Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama, 36104.

3. The Honorable Sidney Dickstein of the law firm of Morin, Dickstein, Shipiro and Galligan, of counsel for petitioner herein, by placing three copies of said brief in the mail, postage prepaid, and properly addressed to the Honorable Sidney Dickstein of the law firm of Morin, Dickstein, Shipiro and

Galligan, 800 Federal Bar Building West, Washington, D.C., 20006.

Curtis Wright

Subscribed and sworn to before me,
this the 11th day of May, 1973.

Notary Public — State of Alabama at Large

APPENDIX A

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: SC 132

EX parte: Sam Dean
Re: Gadsden Times
Publishing Corp. VS. Sam Dean
Appellant *Appellee*

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____) Petition for Writ of Certiorari denied. No opinion.
____) Submitted on briefs
____) Appellant granted additional time to file transcript of record to and including
XX) Application for rehearing overruled
____) Appell____ granted 15 additional days to file briefs to and including
____) Appell____ granted 15 additional days to file reply briefs to and including
____) Transcript filed (Notice under Rule 12)
____) Permission to file amicus curiae briefs granted
____) Permission to make additional assignments of error granted.
____)

/s/ J. O. SENTELL
Clerk, Supreme Court of
Alabama

November 29, 1972

FILE COPY

Supreme Court, U.S.
FILED
MAY 24 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,

PETITIONER

VS.

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,

RESPONDENT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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OF COUNSEL

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OCTOBER TERM, 1972

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SAM DEAN,

PETITIONER

VS.

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,

RESPONDENT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

Petitioner respectfully submits this brief in reply to the brief of the respondent in opposition to a petition for writ of certiorari to the Court of Civil Appeals of Alabama.

The respondent raised certain matters in his brief in opposition which should be clarified by petitioner. In petitioner's application for an extension of time within which to file a petition for writ of certiorari, petitioner asserted that the Supreme Court of Alabama denied an application for rehearing on November 30, 1972. Respondent raises the point that the application was denied on November 29, 1972, and attaches a copy of a notification from the Clerk of the Supreme

Court of Alabama dated November 29, 1972, that shows such action was taken on that day. However, Title 28, Section 2101(c), United States Code Annotated, provides that the time for filing is computed from the date of the actual entry of the judgment. Action by the Alabama Supreme Court may have been taken on November 29, but the judgment or decree was not entered until November 30. The date of the denial of the rehearing was indicated in the opinion as November 30. The Clerk of the Supreme Court of Alabama advised the attorneys for petitioner that the judgment of denial was entered on November 30.

The entry of the denial of the rehearing was made on November 30, 1972, and the extension of time was timely granted by this court. Were there any error, it was not in any way intended to mislead the Court in seeking an extension of time.

Furthermore, the application was filed within ninety days from either date, and the order of Mr. Justice Powell was entered within that time. The reasoning of the respondent, that the application should have been filed by February 17, 1973, is totally outside the realm of reason.

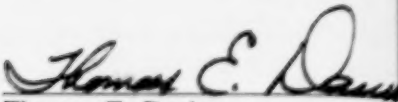
Respondent raises the point in his brief that the statute is defective because the application presents some inequities among respective employers and that all employers are not treated equally. This court has said, on numerous occasions, that inequality of application does not in and of itself render a statute unconstitutional, as long as the state has a legitimate interest in the matter at hand. Because there can be no mathematical certainty in enacting a statute, the state is not required to sit back and pass no legislation if the problem can be alleviated by appropriate legislation.

Respondent insists that this court follow the dissent of Mr. Jackson in *Day-Brite Lighting v. Missouri*, 342 U. S. 421, 72 Supreme Court 405. He cites the cases of *Illinois Central Railroad Company v. Commonwealth*, 305 Kentucky 632, 204 Northwestern 2d 973, *Heimgaertner v. Benjamin Electric Manufacturing Company*, 6 Illinois 2d 152, 128 Northeastern 2d 691. This court declined to review the case of *Illinois Central Railroad Company v. Commonwealth*, supra. The denial by this court of certiorari was certainly not an adoption or ratification of the lower court's holding. Those cases represent a minority view of two states, and do not reflect this court's philosophy. The opinion in *Day-Brite Lighting v. Missouri*, supra, shows that those cases cited by respondent were considered by the court in its opinion and that it recognized them as being contrary. Those cases were considered by this court in the Day-Brite case and were rightfully rejected as being not representative of this court's philosophy. The position urged by respondent reflects a position urged upon this court over twenty years ago. It was rejected then and should be rejected now, for recent decisions indicate that, if this court's viewpoint has changed at all, it has drifted further away from the position of the respondent. The modern trend clearly indicates a reluctance by this court to oversee and review actions by state legislatures.

CONCLUSION

For the reasons heretofore argued by petitioner, and for the ones set forth above, it is strongly urged that this court should not only review the decision below, but should grant a summary judgment, reversing the decision of the court below and remanding it with instructions consistent with this court's holdings.

Respectfully submitted,



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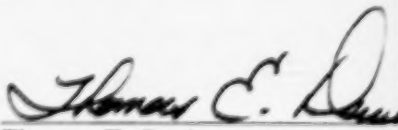
PROOF OF SERVICE

I, Thomas E. Davis, of the law firm of Burns, Carr & Shumaker, attorneys of record for Sam Dean, petitioner herein, depose and say that on the 22 day of May, 1973, I served a copy of the foregoing Reply to Brief of Respondent in Opposition on the Honorable Curtis Wright, of the law firm of Dortch, Wright & Ford, attorneys of record for the respondent herein.



Thomas E. Davis

DEAN *v.* GADSDEN TIMES PUBLISHING CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

No. 72-1310. Decided June 11, 1973

An Alabama statute that provides that an employee excused for jury duty "shall be entitled to his usual compensation . . . less the fee or compensation he received for serving" as a juror, does not deprive the employer of property in violation of the Due Process Clause of the Fourteenth Amendment. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421.

Certiorari granted; 49 Ala. App. 45, 268 So. 2d 829, reversed.

PER CURIAM.

Petitioner sued respondent, his employer, to recover compensation lost as a result of the employee's being required to serve as a juror. An Alabama statute provides that an employee excused for jury duty "shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving" as a juror. Ala. Code of 1940, Tit. 30, § 7(1) (Supp. 1971). It appears that petitioner served on a jury, received pay for the jury duty and submitted a bill of $63 to respondent, the difference between his regular wages and his jury pay. Respondent refused to pay; the trial court rendered a judgment for petitioner; but the Court of Civil Appeals of Alabama held the state Act unconstitutional. 49 Ala. App. 45, 268 So. 2d 829. The Supreme Court of Alabama denied certiorari to review that judgment. 289 Ala. 743, 268 So. 2d 834. The case is here on petition for a writ of certiorari which we grant.

The Court of Civil Appeals held that the Act deprives the employer of property in violation of the Due Process Clause of the Fourteenth Amendment, its main reliance

being on *Coppage* v. *Kansas*, 236 U. S. 1. *Coppage* declared unconstitutional as violative of due process a state statute which made it a misdemeanor for an employer to require an employee to agree not to join or remain a member of a union during his employment. That was when substantive due process was in its heyday. We cited *Coppage* along with other decisions of like tenor in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, where we sustained a state statute which made it a misdemeanor for an employer to deduct wages of an employee for four hours when the employee absents himself from his job in order to vote. We held that the requirement placed on the employer to pay wages for this brief period when the employee is voting stood constitutional muster.

We said:

> "Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the

opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*,[1] *Coppage*, and *Adkins*[2] cases." *Id.*, at 424–425.

The Alabama statute stands on no less sturdy a footing.

Reversed.

[1] *Lochner* v. *New York*, 198 U. S. 45.
[2] *Adkins* v. *Children's Hospital*, 261 U. S. 525.